80-1440

No.

Supreme Court, U.S.
FILED
SEP 17 1980
MICHAEL RODAK, JR., CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979

HENRY BAPTISTE,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

On Application for a Writ of Certiorari
to the United States Court of Appeals
for the Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

The alternative questions presented for review by this Honorable Court are:

1. Whether the determination of the issue of "materiality" in a prosecution under 18 U.S.C. 1623 is a question exclusively for the Court or is an issue to be determined by the jury?

2. If a question for the Court alone, whether evidence admitted solely in proof of the element of "materiality" to the Court should have been presented only to the Trial Judge in proceedings conducted outside the presence of the jury?

3. If a question for the jury and not exclusively for the Court, whether the petitioner was denied his constitutional right to trial by jury and due process of law when the Trial Court instructed the jury to find for the Government on the essential element of "materiality" of the allegedly false statements and documents presented to the grand jury?

INDEX

Opinions Below 2

Grounds on Which Supervisory Jurisdiction is Invoked 3

Questions Presented for Review 4

Constitutional & Statutory Provisions Involved 5

Statement of the Case 7

Reasons for Allowing the Writ 18

Conclusion 30

Certificate of Service 31

Table of Authorities Cited

CASES:

Brooks v. U.S., 253 F.2d 362 (5 Cir. 1958) 25
Sinclair v. U.S., 279 U.S. 263 (1929) 19, 20, 23, 24, 27, 28, 30
Sparf & Hansen v. U.S., 156 U.S. 51 (1895) 20
U.S. v. Baptiste, 608 F.2d 666 (5 Cir. 1979) 2, 12
U.S. v. Damato, 554 F.2d 1371 (5 Cir. 1977) 11, 18, 23, 25
U.S. v. Freedman, 445 F.2d 1220 (2 Cir. 1971) 25
U.S. v. Gremillion, 464 F.2d 901 (5 Cir. 1972) 25
U.S. v. Hyde, 448 F.2d 815 (5 Cir. 1971) 21
U.S. v. Ragsdale, 438 F.2d 21 (5 Cir. 1971) 21
U.S. v. Skinner, 437 F.2d 164 (5 Cir. 1971) 21
U.S. v. Whimpy, 531 F.2d 768 (5 Cir. 1976) 25
Winship, In re, 397 U.S. 358 (1970) 22

CONSTITUTIONAL AND STATUTORY AUTHORITIES CITED

United States Constitution

Article III, Sec. 2, cl. 3 5, 20, 26, 28

Fifth Amendment 6

Sixth Amendment 5, 20, 26, 28

United States Code

2 U.S.C. 192, former R.S. Sec. 102 20

18 U.S.C. 1623 6, 22 27

18 U.S.C. 1951 27

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TO THE HONORABLE, THE CHIEF JUSTICE OF THE UNITED STATES AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT:

Henry Baptiste, petitioner herein, applies to this Honorable Court for a writ of certiorari to review the judgment

and opinion of the United States Court of Appeals for the Fifth Circuit affirming the judgment and verdict in this case on December 21, 1979.

OPINIONS BELOW

The opinion of the Fifth Circuit Court of Appeals, officially reported at pages 1911-1913 of the 1979 Term Slip Opinions of the said Court and unofficially reported at 608 F.2d 666, is annexed hereto and marked Appendix A.

The judgment denying petitioner's application for rehearing and suggestion of rehearing en banc is officially reported at page 7191 of the Fifth Circuit's Slip Opinions for the 1979 Term and is unofficially reported at 620 F.2d 300 (Table). The said order denying rehearing and rehearing en banc is reproduced herein as Appendix B.

There were no relevant written opinions of the Trial Judge, however the

written recommendation of the Magistrate on a motion in limine is relevant and is reproduced herein as Appendix C.

GROUNDS ON WHICH SUPERVISORY JURISDICTION OF THIS COURT IS INVOKED

The judgment of the United States Court of Appeals for the Fifth Circuit was rendered on December 21, 1979. A copy thereof is annexed hereto as Appendix D.

A timely petition for rehearing and suggestion for rehearing en banc was denied on June 12, 1980. (Appendix B)

Honorable Lewis F. Powell, Jr., Associate Justice of this Court and Circuit Justice for the Fifth Judicial Circuit, extended the time for filing this petition to August 11, 1980, and a further extension of ten days, to and including the 21st day of August, 1980, has been requested due to a malfunction of our word processor printer which disabled

us from printing this document as camera-ready copy for offset printing or from even listing the text in hard copy.

Jurisdiction of this Honorable Court to review the judgment and opinion of the Court below upon petition for a writ of certiorari is conferred by 28 U.S.C. 1254(1) and petitioner hereby invokes the said jurisdiction of this Court to review the judgment of the Fifth Circuit Court of Appeals and the United States District Court for the Middle District of Louisiana.

QUESTIONS PRESENTED FOR REVIEW

The alternative questions presented for review by this Honorable Court are:

1. Whether the determination of the issue of "materiality" in a prosecution under 18 U.S.C. 1623 is a question exclusively for the Court or is an issue to be determined by the jury.

2. If a question for the Court

alone, whether evidence admitted solely in proof of the element of "materiality" to the Court should have been presented only to the Trial Judge in proceedings conducted outside the presence of the jury.

3. If a question for the jury and not exclusively for the Court, whether the petitioner was denied his constitutional right to trial by jury and due process of law when the Trial Court instructed the jury to find for the Government on the essential element of "materiality" of the allegedly false statements and documents presented to the grand jury.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Article III, Section 2, clause iii of the Constitution, in relevant part, guarantees that:

> The Trial of all Crimes, except in cases of Impeachment, shall be by

Jury * * *.

The Fifth Amendment to the Constitution, in relevant part, guarantees that:

> No person shall * * * be deprived of life, liberty, or property, without due process of law * * *.

The Sixth Amendment to the Constitution, in relevant part, guarantees that:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury * * *.

Title 18, United States Code, Section 1623, in relevant part, provides:

> (a) Whoever under oath * * * in any proceeding before or ancillary to any * * * grand jury of the United States knowingly makes any false material declaration or makes or uses any other information, including any book, paper, document, record, recording, or other material, knowing the same to contain any false material declaration, shall be fined not more than $10,000 or imprisoned for not more than five years, or both.

STATEMENT OF THE CASE

Petitioner was indicted upon five counts of making false material declarations before a grand jury and/or using documents containing false material declarations before a grand jury in the Middle District of Louisiana. Petitioner was arraigned and entered a plea of not guilty of all five charges. After a trial by jury, petitioner was convicted on two counts, acquitted on one, and the jury was unable to reach a verdict on two counts of the indictment.

Prior to trial, the Government filed a Motion for Pre-Trial Determination of Materiality Issue (hereinafter "motion in limine"); the defense took the position that the issue should be decided by the jury, but, if not, then the issue of materiality should have been decided by the Court prior to trial. The Magistrate heard that motion and held:

> It is settled that the materiality of an alleged perjurious statement before a grand jury, as well as the scope of the grand jury investigation, are matters of law to be determined by the judge after hearing the factual basis upon which the Government contends that the statements were material. This determination should be made out of the presence of the jury to avoid prejudice to the defendant.

The Magistrate believed that a pre-trial determination of materiality would possibly provoke "adverse pre-trial publicity which could affect the selection of the jury" and opted to defer the determination of the issue to the trial on the merits, but in proceedings to be conducted out of the presence of the jury.

At the trial of this cause, the Government called as its first witness the Court Reporter who stenographically reported the notes of evidence taken before the grand jury. The transcripts were identified through that witness and it was stipulated by the parties that the

transcripts were the transcripts of the petitioner's testimony before the grand jury. The Court Reporter testified that the testimony adduced from petitioner was given under oath by petitioner.

The Government next called one of the prosecutors as a witness. Shortly after direct examination of that witness commenced, the following proceedings were had:

> Q. Did the Grand Jury have occasion to investigate the bidding procedures of Community Advancement, Incorporated, in relation to Henry Baptiste and H&B of Louisiana?
>
> A. Yes, it did. It occurred that CAI is a grantee, that is they received moneys from what replaced the--
>
> MR. MC PHERSON: Excuse me, Your Honor. I hate to interrupt, but in order to lodge an objection to relevancy--
>
> THE COURT: Objection is sustained. The original part of the answer was responsive; the rest is not.
>
> * * * * * *

Q. Okay. Did the Grand Jury also receive evidence that H&B of Louisiana was doing work for CAI but it was substandard work and yet H&B was being paid for it?

MR. MC PHERSON: Objection, Your Honor. That is not relevant to the matter at issue before this Court today.

THE COURT: The only relevance I see is to the question of materiality.

MR. BECKNER (U.S. Attorney): That's correct--

It is clear that the only relevant issue to which the prosecutor's testimony was directed was materiality and that the evidence would have been excluded by the Court on other issues:

THE COURT: * * * if they are taking the position they were not material, that is a matter of law for the Court to decide, and, of course, there has to be evidence to show whether it was material or not.

So if the defense is questioning the materiality of the statements alleged to have been untrue, then the objection must be overruled; otherwise I would sustain your objection.

Both the Government and the defense, in

accordance with the Fifth Circuit's opinion in United States v. Damato, 554 F.2d 1371, 1373 (5 Cir. 1977), had taken the position prior to trial that if the determination of "materiality" of the alleged false statements or documents was to be made by the Court alone, that determination should be made out of the presence of the jury. The defense, however, took the additional position that the issue of "materiality," just as any other essential element of an offense, was required to be determined by the jury, except where there was an absence of sufficient evidence to permit a reasonable jury to conclude beyond a reasonable doubt that the statements or documents were "material," in which case a judgment of acquittal would be required.

The last quoted statement of the Court indicated that it intended to de-

cide the issue, rather than to submit it to the jury, but that it intended to permit the jury to hear the evidence. The defense urged:

> MR. MC PHERSON: Your Honor, I want to object again on the basis of the Court's statement that the Jury is not to consider materiality, then perhaps the better procedure might be for the jury not to hear evidence that doesn't relate to matters that the Jury has to determine.
>
> THE COURT: No, the objection is overruled.

The Court below, with regard to the above quoted objections to the witness testifying before the jury on the issue of materiality if the Court intended to usurp the role of the fact-finder on that essential element of the alleged offense, held (608 F.2d at 668):

> * * * There are three problems facing Baptiste in connection with this latter contention. First, the testimony of the witness in question did not bear solely on materiality but related to other issues as well. * * * Second, when the testimony was given, Baptiste's counsel was taking the position that the issue should be

> submitted to the jury. The record does not evidence a clear objection to the witness' testimony. Although Baptiste's counsel voiced three objections to the testimony in question, the first two did not address the issue and in the context of his present contention his third objection was at least ambiguous. Third, Baptiste's grand jury transcripts, which had been admitted into evidence without defense objection, contained essentially the same material as did the challenged testimony. Any error made by the trial judge in connection with the live testimony was harmless. It could not have prejudiced Baptiste any more than the transcript of his own grand jury testimony.

The objection made by the defense was not that the prosecutor should not have been permitted to testify, but that he should not have been permitted to testify in the presence of the jury about matters which the Court had determined it would not submit to the jury but would itself determine. At the time of the above quoted objections, the defense was clearly taking the alternative position that the evidence should not have been

submitted to the jury if the jury was not going to be allowed to decide the issue. The Court below was incorrect that at the time of these three objections "Baptiste's counsel was taking the position that the issue should be submitted to the jury." That statement would be correct only by replacing the language, "was taking," with the words "had previously taken." The objection to the relevance of this line of testimony in this trial to a jury made sense only in the context that the Court had determined to rule on the issue without the jury. If petitioner's position taken prior to trial had been sustained, the evidence would have been relevant to the issues pending before the jury and would not have been found objectionable by the defense.

The reference in the second objection to "the matter at issue before this

Court today" clearly meant, and was so construed by the Court and the Government counsel to mean, that the prosecutor's testimony was not relevant to the issues being left to the jury to determine on this trial.

Unless referring to the "proper" procedure, if it is proper for the Court to usurp the jury's role on an essential element of the offense, as the "better" procedure rendered defense counsel's objection "ambiguous," there was nothing ambiguous about the objections. The Court and all parties in the Trial Court clearly understood the context in which the defense objection was stated, which understanding concurred with the specific objection made by petitioner in the Court below. If there was any ambiguity in this case with regard to the role of the Court and jury, respectively, it was on the part of the Trial Judge. After de-

termining that the issue of materiality was a decision to be made by the Court and not the jury, the Court said:

> THE COURT: * * * I don't mean to say that the Jury cannot consider materiality, they can; but the question of whether it is or is not material is ultimately a question for the Court to decide. Certainly for whatever it's worth in the total case, they can consider materiality, of course.

At the conclusion of the Government's case, after the Court denied petitioner's motion for a judgment of acquittal, the Court recessed and held proceedings in Chambers with regard to an evidentiary point and defendant's proposed jury charges submitting to the jury for its determination the issue of materiality of the alleged false statements and/or documents. The Court reiterated its previous position that materiality is an issue of law, not fact, and advised the defense that it would instruct the jury that "they must consider these

statements as being material."

During the Court's instructions to the jury, the Court did indeed instruct the jury that it had found the statements to be material and foreclosed that issue from the jury's determination:

> * * * Now, those are the three things that you must consider. There is a fourth element that is a matter of law, and that is, that the questions and answers or the statements that he's charged with having made were material to the grand jury investigation. And that is a matter of law for the court to decide. That decision has been made, and I have ruled that the questions and answers included in this indictment are in fact material to the grand jury investigation. It was the conclusion of the court that the questions and answers involved are, indeed, material. They were, in the opinion of the court, questions that were part of the legitimate grand jury proceeding and inquiry. So you will accept from the Court the fact that the statements which the indictment alleges were false and knowingly given are material. Consequently, if you conclude as to any count that the Government has proved the other three elements beyond a reasonable doubt, then you must convict, because the fourth element I tell you had been proved, and you must accept that.

REASONS FOR ALLOWING THE WRIT

The Court of Appeals has decided an important question of Federal Constitutional and statutory law in a way which has so far departed the accepted and usual course of judicial proceedings in the United States as to call for the exercise of this Court's supervisory jurisdiction.

The Court below followed its prior decision in United States v. Damato, 554 F.2d 1371, 1372-73 (5 Cir. 1977), in which the Fifth Circuit said:

> Materiality is an essential element of an offense charged under 18 U.S.C. 1623(a). The statute itself explicitly requires that the false declaration be material. The test of materiality is "whether the false testimony was capable of influencing the tribunal on the issue before it." * * * The statements need not be material to any particular issue, but may be material to collateral matters tha might influence the court or the jury in the decision of the questions before the tribunal. * * * To establish its case, the Government bears the burden of proving materiality. * * * In the usual perjury case, the Government meets its burden of proof either by entering the transcript of the prior proceedings into evidence, or by presenting testimony from persons who witnesses the proceedings. The issue is a question to be

> decided by the court and is not an issue for the jury to determine. Since this is so, evidence bearing solely on materiality should be received outside the presence of the jury. The trial court should embody its finding on materiality in an instruction to the jury. (Citations and footnotes omitted)

The only dispute with the above-quoted statement of the law is with the last three sentences:

> * * * The issue is a question to be decided by the court and is not an issue for the jury to determine. Since this is so, evidence bearing solely on materiality should be received outside the presence of the jury. The trial court should embody its finding on materiality in an instruction to the jury.

It is petitioner's respectful contention that, since materialityis a statutory element of the offense and not merely a judicial requirement, the only proper entity to ascertain whether that element of the offense has been proved is the jury.

We recognize that this Court, in Sinclair v. United States, 279 U.S. 263,

298-299 (1929), held that the determination of "pertinency" to matters before the Congress (construing former R.S. Section 102, 2 U.S.C. 192, a contempt--type statute) is a matter of law and that the situation in the present case is analogous to that presented by Sinclair. Since Sinclair has been consistently cited by all lower courts as authority for the trial judge to take an element from the jury and to decide that issue independently of the jury, we recognize that in order to prevail it is necessary that this Court re-examine and overrule Sinclair to the extent that it conflicts with the accused's right to trial by jury guaranteed under Article III, Section 2, cl. iii and the Sixth Amendment to the Constitution.

In Sparf & Hansen v. United States, 156 U.S. 51 (1895), Mr. Justice Harlan stated that it was not competent for the

court, in a criminal case, to instruct the jury to find the accused guilty of the offense charged, or of any lesser included offense. In United States v. Skinner, 437 F.2d 164, 165 (5 Cir. 1971); United States v. Ragsdale, 438 F.2d 21, 27 (5 Cir. 1971); and United States v. Hyde, 448 F.2d 815, 855 (5 Cir. 1971), cert. den., 404 U.S. 1058 (1972)(RIVES, J., dissenting), the Court below has acknowledged "that no matter how conclusive the evidence, a court may not direct a verdict of guilt in whole or in part." Instructing the jury that the Court has determined the issue of materiality is tantamount to a partial direction of guilty on that essential element of the alleged offense. We respectfully submit that it is inconsistent with due process under the Fifth Amendment to the Constitution and that it is inconsistent with the above cited provisions of the Con-

stitution which guarantee an accused a trial by jury in Federal courts for the judge to make the determination of an essential element and instruct the jury to find in accordance with the Court's instruction.

"Materiality" is a statutory element of 18 U.S.C. 1623. That requirement is twice stated in the statute. Ante, p. 6. Under the recent teaching of this Court in In re Winship, 397 U.S. 358, 364 (1970), this Court held that the defendant in a criminal case is entitled not to be convicted except upon proof beyond a reasonable doubt of every essential element of the alleged offense. It is the jury, not the Court, which is constitutionally allocated the responsibility for determining whether the government has proven an element of an offense beyond a reasonable doubt. We can find no situation in which the Trial Judges have been

held to the reasonable doubt standard on an element the courts have taken it upon themselves to determine without the jury. United States v. Damato, supra, is the closest case to such a holding and in that case the government did not even introduce any evidence to show the nature of the issues pending before the Court in order that such a determination could have been made. Instead of ordering entry of a judgment of acquittal, the Court remanded for a new trial. Such a disposition of a case so devoid of evidential support of a conceded essential statutory element of the charged offense indicates that, while the courts are calling "materiality" an essential element of the offense, consistently with the obvious congressional intent, the courts are not treating it as such. This, we submit, is improper and unconstitutional.

This Court's rationale in Sinclair

for holding that "pertinency" is a question for the Court alone is as follows (279 U.S. at 298-299):

> 5. The question of pertinency under section 102 was rightly decided bythe court as one of law. It did not depend upon the probative value of evidence. That question may be likened to those concerning relevancy at the trial of issues in court, and it is not essentially different from the question as to materiality of false testimony charged as perjury in prosecutions for that crime. Upon reasons so well known that their repetition is unnecessary, it is uniformly held that relevancy is a question of law. * * * And the materialityof what is falsely sworn, when an element of the crime of perjury, is one for the court. * * *
>
> The reasons for holding relevancy and materiality to be questions of law in cases such as those above referred to apply with eqal force to the determination of pertinency arising under section 102. The matter for determination in this case was whether the facts called for by the question were so related to the subjects covered by the Senate's resolutions that such facts reasonably could be said to be "pertinent to the question under inquiry." It would be incongruous and contrary to well-established principles to leave the determination of such a matter to a jury. *

* * (Citations omitted)

The determination of "materiality" obviously depends upon the probative value of evidence. United States v. Damato, supra; Brooks v. United States, 253 F.2d 362, 364 (5 Cir.), cert. den., 357 U.S. 927 (1958); United States v. Freedman, 445 F.2d 1220 (2 Cir. 1971); United States v. Gremillion, 464 F.2d 901, 904--905 (5 Cir.), cert. den., 409 U.S. 1085 (1972); United States v. Whimpy, 531 F.2d 768, 770 (5 Cir. 1976).

The foundation for all the cases permitting the courts to find "relevancy," "pertinency," or "materiality" as essential elements of the alleged offense, in our view, is the confusion of the role of the court in determining the character of evidence for admissibility purposes with the determination of the elements of the same name when those elements are necessary to support a con-

viction. The trial court's role is to rule upon admissibility of the evidence. It is not the Court's role to determine the sufficiency of proof of any essential element, except in the limited circumstances where it is contended that the evidence is constitutionally inadequate to support a guilty verdict.

The accepted and usual course of judicial proceedings in this nation, when trial is to a jury, is to permit the judge to regulate the proceedings and the jury to decide the essential elements of the accused's guilt. The jurisprudence permitting judges to usurp the constitutionally mandated duty of the jury to determine guilt will not square with the traditions of our jury trial system. Since the jury system is constitutionally mandated (Art. III, Sec. 2, cl. iii and Sixth Amendment to the Constitution), it is the jurisprudence contravening the

Constitution which must give way.

This Court should reconsider Sinclair v. United States, supra, and overrule it to the extent it permits the Court to usurp powers constitutionally vested in the jury.

This case presents an important federal constitutional question not ony with regard to prosecutions under 18 U.S.C. 1623 but also with regard to prosecutions under 18 U.S.C. 1951 and all other cases in which the jurisprudence has permitted the diminution of the constitutionally guaranteed right to a jury trial and all of its concomitant benefits, including and especially the right to have the jury decide each and every essential element of guilt.

The correction of the injustice of such rules which would permit the Court to take from the jury issues which it feels the jury might be ill equipped to

handle, such as applying properly defined legal principles to determine in a particular case whether a question and answer or document produced before the grand jury were "material," is in our respectful belief the proper role of this Honorable Court in supervising the course of judicial proceedings in the Federal Courts. Therefore, this Court should grant this application for a writ of certiorari and reconsider the continuing validity of such jurisprudence as Sinclair v. United States, supra, and the instant case.

Even if this Court should determine that it is not constitutionally required that the jury determine each essential element of the case upon proper instructions to the jury, a holding which we submit would drastically erode the constitutional protections of Article III and the Sixth Amendment to the Constitu-

tion, the Trial Court in this case, with the sanction of the Court below, did not even require that the evidence relevant solely to the issue of materiality be presented outside the presence of the jury. Under Amato, that was required. Because the Court below sanctioned the departure of the Trial Court from those procedures which have been promulgated to protect the accused from prejudice resulting from the disclosure of the nature of the grand jury investigation and the criminal conduct of others which precipitated that investigation, i.e., the procedure requiring that the evidence relevant solely to materiality be adduced outside the presence of the jury, this Court should exercise its supervisory jurisdiction and reverse the judgment below. The government has been granted the windfall in this case of having the Trial Court determine an essential ele-

ment of guilt in violation of the fundamental concept of the right to a jury trial and adducing all of the prejudicial evidence relevant only to materiality before the jury. That is fundamentally unfair and violates due process and the right to trial by jury.

CONCLUSION

For the foregoing reasons, this Court should grant review of the judgment below, overrule Sinclair v. United States, supra, and its progeny, and remand this matter to the trial court for a proper trial by jury. In the alternative only, if this Court sanctions the erosion of the constitutional right to have the jury determine every essential element of guilt, it should at least enforce the protective procedures requiring that the evidence relevant to the issue of materiality be adduced outside the presence of the jury. Since that procedure was

not even followed in the instant case, this Court should vacate the judgment below and remand this cause for a proper trial utilizing the aforesaid procedure.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, James A. McPherson, a member of the bar of the Supreme Court of the United States, certify that the requisite number of copies of the foregoing petition for a writ of certiorari have been served on the Solicitor General of the United States by mailing three copies of same to him at his office in Washington, D.C., this 21st day of August, 1980.

JAMES A. MC PHERSON
Attorney at Law

APPENDIX A

UNITED STATES of America,
Plaintiff-Appellee,

vs.

Henry BAPTISTE,
Defendant-Appellant.

No. 78-5673
United States Court of Appeals,
Fifth Circuit

Dec. 21, 1979.

Before WISDOM, HILL and VANCE, Circuit Judges.

VANCE, Circuit Judge:

Henry Baptiste appeals his conviction under 18 U.S.C. 1623 for making false declarations before a grand jury and using documents containing a false and material declaration in his grand jury testimony. He was sentenced to pay a fine of one thousand dollars and to three years probation. We affirm.

Baptiste testified before a grand jury which was investigating Community Advancement, Inc. (CAI), an organization that had received federal funds to pro-

vide social services to poor people in Baton Rouge, Louisiana. The investigation centered on whether CAI officials had skimmed the federal funds. Baptiste was questioned in connection with printing work he had done for CAI. At trial, the government's evidence showed that in his grand jury testimony Baptiste misstated the cost of such work, misstated his profit and produced a false invoice.

On appeal, Baptiste first argues that the trial court erred in instructing the jury that his testimony before the grand jury was material for purposes of 18 U.S.C. 1623. He contends that the jury should have been allowed to determine materiality for itself and that the trial court's instruction in effect amounted to partial direction of a verdict of guilty. Baptiste concedes that his position is contrary to the law of this circuit. United States v. Damato, 554 F.2d 1371 (5th Cir. 1977). Bap-

tiste's contention on this point must therefore be rejected.

Baptiste also contends that, if materiality is a question for the court to decide, the trial court erred in allowing the jury to hear testimony going to materiality. He relies on the correct statement of law in Damato that

> The issue is a question to be decided by the court and is not an issue for the jury to determine. Since this is so, evidence bearing solely on materiality should be received outside the presence of the jury.

Id. at 1373 (footnotes omitted). There are three problems facing Baptiste in connection with this later contention. First, the testimony of the witness in question did not bear solely on materiality but related to other issues as well. See Harrell v. United States, 220 F.2d 516, 520 (5th Cir. 1955). Second, when the testimony was given, Baptiste's counsel was taking the position that the issue should be submitted to the jury.

The record does not evidence a clear objection to the witness' testimony. Although Baptiste's counsel voiced three objections to the testimony in question, the first two did not address the issue and in the context of his present contention his third objection was at least ambiguous. Third, Baptiste's grand jury transcripts, which had been admitted into evidence without defense objection, contained essentially the same material as did the challenged testimony. Any error made by the trial judge in connection with the live testimony was harmless. It could not have prejudiced Baptiste any more than the transcript of his own grand jury testimony.

A more serious question is presented in connection withthe trial court's erroneous instruction that

> Proof beyond a reasonable doubt is the kind of proof that you would be willing to rely and act upon in the management of your own personal affairs.

This instruction was incorrect but was not objected to by Baptiste. The trial court will therefore be reversed only if the instruction committed plain error. Fed.R.Crim.Pro. 52(b). Our inquiry is whether the court's charge, taken as a whole, adequately conveyed the correct meaning of reasonable doubt to the jury as opposed to focusing on whether one sentence in the charge was not proper. United States v. Vitale, 596 F.2d 688, 690 (5th Cir. 1979). The offending instruction was identical to the one in Vitale.[1] As in that case we find that the charge as a whole adequately conveyed to the jury the correct meaning of reasonable doubt.

1. The attorneys for both sides and the trial judge are the same in this case as in Vitale. The similarity of the two instructions, which is not apparent without reference to the record since the instruction was not quoted in Vitale, was brought to our attention during oral argument.

This case was tried eleven months before Vitale condemned the offending sentence. Because it did not quote the instruction, Vitale could not serve as a warning to trial judges. After today's decision, however, there should be no occasion for repetition of the erroneous form instruction as to reasonable doubt. Further use of this instruction, however supplemented, unnecessarily invites reversal.

We have considered Baptiste's other claims of error and find them to be without merit.

AFFIRMED.

APPENDIX B

UNITED STATES COURT OF APPEALS

FIFTH CIRCUIT

Office of the Clerk

June 12, 1980

TO ALL PARTIES LISTED BELOW:

NO. 78-5673

U.S.A. v. Henry Baptiste

(Cr. 78-34)

Dear Counsel:

This is to advise that an order has this day been entered denying the petition( ) for rehearing, and no member of the panel or Judge in regular active service on the Court having requested that the Court be polled on rehearing en

banc (Rule 35, Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 16) the petition( ) for rehearing en banc has also been denied.

See Rule 41, Federal Rules of Appellate Procedure for issuance and stay of the mandate.

Very truly yours,

GILBERT F. GANUCHEAU, Clerk

By P. Keller
Deputy Clerk

cc: Mr. James A. McPherson
Mr. C. Michael Hill

APPENDIX C

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF LOUISIANA

MINUTE ENTRY:
May 19, 1978
POLOZOLA, M.

UNITED STATES OF AMERICA

vs.

HENRY BAPTISTE

The United States has filed a motion for a pre-trial determination of materiality. The defendant agrees that a pre-trial hearing should be held on this issue.

It is settled that the materiality of an alleged perjurious statement before a grand jury, as well as the scope of the grand jury investigation, are matters of law to be determined by the judge after hearing the factual basis upon which the

Government contends that the statements were material. This determination should be made out of the presence of the jury to avoid prejudice to the defendant. If the Court finds that any of the statements were not material to the grand jury investigation, then that portion of the indictment must be dismissed because materiality is an essential element of a violation of 18 U.S.C. 1623. Thus, the determination of materiality may be made at the time of trial or prior to trial.

The Court believes that it would be in the best interest of justice for the Court to determine the materiality of the statements the defendant is charged with making after the trial jury has been selected. This will avoid possible adverse pre-trial publicity which could affect the selection of a jury and possibly cause the Court to delay these proceed-

ings or transfer the case to another district for trial. Therefore:

IT IS ORDERED that the motion of the United States for pre-trial determination of materiality be, and it is hereby DENIED.

s/ FRANK J. POLOZOLA

U. S. MAGISTRATE

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 78-5673

D.C. Docket No. CR-78-34

UNITED STATES OF AMERICA
vs.
HENRY BAPTISTE

Appeal from the United States District Court for the Middle District of Louisiana

Before WISDOM, HILL and VANCE, Circuit Judges.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Middle District of Louisiana, and was argued by counsel;

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed.

DEC. 21, 1979

APPENDIX E

SUPREME COURT OF THE UNITED STATES

NO. A-78

HENRY BAPTISTE,
Petitioner,
vs.
UNITED STATES

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

UPON CONSIDERATION of the application of counsel for petitioner,

IT IS ORDERED that the time for filing a petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including August 11, 1980.

/s/ Lewis F. Powell, Jr.
Associate Justice of
the Supreme Court of
the United States

Dated this 23rd
day of July, 1980.